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No. 96-79

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SAUNDRA JEAN DALE BOGGS,
Petitioner,

v.

THOMAS F. BOGGS, HARRY M. BOGGS AND DAVID M. BOGGS,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONER

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S. Bruce, PENSION CLAIMS: RIGHTS AND OBLIGATIONS (2d ed. 1993) 8

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 33 million persons age 50 or older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and purpose. As a method of promoting independence, AARP attempts to foster the economic security of individuals as they age by seeking to increase the availability, security, equity, and adequacy of private and public pension plans. In 1993, AARP established its Pension Equity Project to advocate for security and equity in retirement benefits and to educate the public about the need for greater safeguards in the pension system. AARP's Women's Initiative advocates for the

economic, social, health and long-term care needs of midlife and older women. In particular, AARP's Women's Initiative works to strengthen the pension system to achieve pension equity for women as workers and spouses.

AARP is qualified to brief the Court on the implications of the decision in this case, having participated as *amicus curiae* in numerous cases involving the Employee Retirement Income Security Act ("ERISA") and other employment laws, including *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

AARP's members and other older Americans depend on ERISA to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* Thus, ERISA's protections, and the ability to enforce those protections, are of vital concern to older workers and retirees, since the quality of their lives in retirement depends heavily upon the security and amount of their pension benefits.[1/]

However, economic security for older women is elusive because so few women receive any pension income to supplement their Social Security benefits.[2/] Only 38% of

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[1/] Private pensions comprise between one-quarter and one-third of total retirement income, depending on marital status, for those individuals receiving such benefits. The Congressional Budget Office has estimated that pension benefits will comprise approximately 30% of total income for retirees in the year 2019. WOMEN'S PENSIONS: RECENT LEGISLATION GENERALLY IMPROVED PENSION ENTITLEMENT AND INCREASED BENEFITS 1-2 (GAO/HRD-92-20, Mar. 1992) (Testimony of Jane L. Ross, Associate Director, Income Security Issues, Human Resources Division, Before the Subcommittee on Retirement Income and Employment, H. R. Select Comm. on Aging) [hereinafter "WOMEN'S PENSIONS"].

[2/] Three-fourths of the nation's 3.3 million elderly poor are women. Women 65 and older are more than twice as likely as older men to be poor (continued...)

retired women 55 and older received pension income in 1994, compared to 57% of men. Even when women do collect a pension, they collect only about half as much as their male counterparts and are more likely to receive their benefits as lump sums rather than as annuities. U.S. Department of Labor, Pension and Welfare Benefits Administration, RETIREMENT BENEFITS OF AMERICAN WORKERS: NEW FINDINGS FROM THE SEPTEMBER 1994 CURRENT POPULATION SURVEY at 3-5 (1995). Accordingly, women are heavily reliant on the pensions they receive as spouses of workers.[3/]

The provisions added by the Retirement Equity Act of 1984 (REA)[4/] to ERISA are key to protecting spousal pension rights. S. REP. NO. 98-575, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS 2547, 2558. If ERISA does not preempt state community property laws, like Louisiana's, which effect ERISA-governed employee benefit plans, then Congress' intent to protect spousal pension rights will be frustrated.

This case, along with the two other cases upon which this Court has granted *certiorari*,[5/] presents the Court with the

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[2/] (...continued)
and near-poor. U.S. Bureau of the Census, CURRENT POPULATION REPORTS, SERIES P60-194, *Poverty in the United States: 1995*, Table 2, at 2 (Sept. 1996).

[3/] Women's Pensions, *supra*, at 9, 10.

[4/] Pub. L. No. 98-397, 98 Stat. 1426 (1984).

[5/] *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A, Inc.*, 57 F.3d 712 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1415 (U.S., Apr. 15, 1996) (No. 95-789) (whether ERISA preempts state prevailing wage laws); *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 74 F.3d 28 (2d Cir.), *cert. granted*, 117 S. Ct. 292 (U.S., Oct. 15, 1996) (No. 95-1594) (whether ERISA preempts a (continued...)

opportunity to clarify the scope of ERISA's preemption's clause. The decision in these cases will have a direct and vital bearing on the economic security of AARP's members and other older Americans. In light of the significance of the issues presented by this case, AARP respectfully submits this brief *amicus curiae*.[6/]

SUMMARY OF ARGUMENT

ERISA preemption analysis is no different from any other preemption analysis. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. at 99. Any state law that directly conflicts with a federal law, either on its face or in application, must be preempted because it would frustrate Congress' purpose in enacting the federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, state laws that conflict with the substantive provisions of ERISA by regulating how benefits are to be paid and by creating specific requirements concerning distribution of benefits must be preempted.[7/] *E.g., District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

Congress enacted ERISA's preemption clause to avoid multiplicity of regulation in order to promote the uniform administration of employee benefit plans. *New York State*

[5/] (...continued)
state law taxing an employee benefit plan acting as a health care provider).

[6/] The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[7/] This case concerns the limited issue of whether, in a context other than divorce, state courts may apply state community property laws to ERISA-governed plans.

Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co. ("Travelers"), 115 S. Ct. 1671, 1677-78 (1995). Through provisions in ERISA and REA, Congress established a detailed procedure for receipt and distribution of benefits in order to improve spousal pension protections. S. REP. NO. 98-575 at 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2558. Although studies indicate that REA has been effective in increasing the number of surviving spouses receiving survivor's benefits, PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW (GAO/HRD-92-49, Feb. 1992), Congress recently enacted additional legislation to improve spousal pension protections, evidencing its intent to continue to dominate in this field. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, §.1457, 110 Stat. 1755, 1818-19 (August 20, 1996).

Enforcement of state community property laws, such as Louisiana's, will undercut the detailed procedure for receipt and distribution of benefits that Congress established through ERISA and REA. Moreover, enforcement of these laws will frustrate Congress' purpose of preventing employee benefit plans from having to comply with different laws in all 50 states. Consequently, ERISA must preempt Louisiana's community property law.

ARGUMENT

I. A STATE LAW THAT DIRECTLY CONFLICTS WITH ERISA MUST BE PREEMPTED BECAUSE IT FRUSTRATES CONGRESS' INTENT TO AVOID A MULTIPLICITY OF REGULATION.

ERISA preemption analysis must follow traditional preemption analysis. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. at 99 ("we discern no solid basis for believing that, Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis"). Accordingly, "'the purpose of Congress is the

ultimate touchstone of preemption analysis.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (*quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))); *see* U.S. CONST. art. VI, cl. 2. Under traditional preemption analysis, any state law that directly conflicts with a federal law, either on its face or in application, must be preempted because it would frustrate Congress' purpose in enacting the federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

"To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). Congress' intent concerning ERISA's preemptive effect is explicitly stated in the statutory language of ERISA § 514(a), 29 U.S.C. § 1144(a). Section 514(a) states that ERISA "shall supersede any and all State laws insofar as they. . . relate to any employee benefit plan" covered by the statute. In interpreting the phrase "relate[s] to" in *Travelers*, 115 S. Ct. 1671 (1995), this Court reiterated the necessity of determining Congress' purpose in enacting ERISA's preemption clause. This Court concluded that "the basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at 1677-78. State laws that conflict with the substantive provisions of ERISA obviously "relate to an employee benefit plan," and must be preempted. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 739. Otherwise, these laws would frustrate Congress' intent to foster uniform administration of employee benefit plans. *Travelers*, 115 S. Ct. at 1677-78.

Accordingly, state laws are preempted if they (1) regulate the types of benefits or terms of a plan, *e.g., District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (workers' compensation law prohibiting termination of health benefits of workers receiving workers' compensation benefits is preempted); (2) create specific requirements as to funding, reporting and disclosure, vesting,

and the like, *e.g., Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) (state law regulating funding and disclosure requirements of ERISA plans is preempted); and (3) establish rules for the calculation of benefits, *e.g., FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (interference with calculation of benefits through state antisubrogation statute); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (prohibition of offset of workers' compensation benefits against retirement benefits). *See generally Airparts Company, Inc. v. Custom Benefit Services of Austin*, 28 F.3d 1062, 1064-65 (10th Cir. 1994); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548, 553 (5th Cir.), *cert. denied*, 497 U.S. 1024 (1990). These laws directly regulate ERISA plans and conflict with ERISA; hence they must be preempted. *Cf. Travelers*, 115 S. Ct. at 1683 (recognizing that laws having direct effects on plans are preempted).

II. CONGRESS ENACTED THE RETIREMENT EQUITY ACT TO IMPROVE SPOUSAL PENSION PROTECTIONS.

A. ERISA Provides Uniform Standards Concerning The Form, Payment and Distribution Of Spousal Benefits.

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). "The statute imposes participation, funding, and vesting requirements on pension plans." *Id.* at 91. ERISA also provides uniform minimum standards for the form, payment and distribution of benefits. Part 2 of ERISA, 29 U.S.C. §§ 201-211. *See generally* Karen C. Holden, *The Income Shock of Widowhood: Public Policy Issues*, Vol. 6, No. 2 THE LAFOLLETTE POLICY REPORT at 11 (Fall 1994); D. McGill and D. Grubbs, Jr., FUNDAMENTALS OF PRIVATE PENSIONS, Chapters 4 - 6 (6th ed. 1989). Through ERISA § 205, Congress mandated a particular benefit structure.

ERISA § 205 requires that a plan that offers benefits in the form of a life annuity -- benefit payments where the continuation of benefits depends on someone's survival -- must offer these benefits in the form of a "qualified joint and survivor annuity." 26 C.F.R. §§ 1.401(a)-11(a)(1) & (b)(1). A qualified joint and survivor annuity "provides benefits during the joint lives of a participant and the participant's spouse, and after the death of the participant (**assuming the spouse is still alive**) provides survivor's benefits of not less than 50 percent, nor more than 100 percent, of the benefits payable during the joint lives of the couple." S. Bruce, PENSION CLAIMS: RIGHTS AND OBLIGATIONS, *Survivor's Benefits* at 260 (2d ed. 1993) (citations omitted) (emphasis added). Benefits are paid to the surviving spouse only if he or she survives the participant.

Prior to the enactment of REA, however, participants could, whether intentionally or unknowingly, sign away their spouse's rights to receive a pension after they died. The spouse did not even have to be informed, let alone give consent to the waiver of survivor benefits. S. REP. NO. 98-575 at 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2558. As a result, many surviving spouses, almost exclusively older women, were left without survivor's pension benefits, placing them in dire financial straits. *Potential Inequities Affecting Women: Hearings on S. 19 and S. 888 Before the Senate Finance Comm. on S. 19 and S. 888*, 98th Cong., 1st Sess. 102-103, 345-51 (June 20, 1983).

B. Congress Enacted The Retirement Equity Act To Require That Spouses Will Automatically Receive A Surviving Spouse's Annuity Unless They Waive Their Rights To That Benefit.

With the passage of REA in 1984, Congress at least partially addressed the economic vulnerability of elderly widows. Congress anticipated that by bringing the spouse into the decision making process concerning the election of benefit options a greater percentage of men would elect the

joint and survivor annuity and give their spouse the opportunity to receive survivor's benefits. S. REP. NO. 98-575 at 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2558; PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW at 3 (GAO/HRD-92-49, Feb. 1992).

As a result, federal laws were amended in order to provide significant pension protections to spouses in the event of the death of the plan participant.[1] REA, which amended ERISA, created the requirement of "spousal consent" in the selection of the form of an annuity payable upon the participant's retirement. *See* ERISA § 205, 29 U.S.C. § 1055; IRC §§ 401(a)(11) & 417, 26 U.S.C. §§ 401(a)(11) & 417. Whereas ERISA had previously required only that a pension plan offer joint and survivor benefits as an option, REA requires the actual written consent of the participant's spouse in the event that the participant does not select an annuity with survivor benefits. Under this requirement, unless the spouse has consented to the participant's selection of an annuity without survivor's benefits, a pension plan will generally pay such benefits to a spouse in the event the participant predeceases his or her spouse. Thus, the joint and survivor option is the automatic, or default, option because the survivor's benefits may not be waived without the written consent of the spouse. If a plan does not offer the joint and survivor annuity as the default benefit option, it will not qualify for tax exempt status.[2] IRC §§ 401(a)(11) & 501(a).

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[1] Although Congress was concerned primarily with widows, the statute is gender neutral. *Ablamis v. Roper*, 937 F.2d 1450, 1453 n. 3 (9th Cir. 1991).

[2] For tax exempt pension plans, employers' contributions for employees' pension benefits are tax deductible to the employer and are not treated as taxable income to the employee. IRC §§ 162(a)(1), 402(a)(1), & 404(a); Treas. Reg. §§ 1.402(a)-1(a)(1)(i) & 1.404(a)-1b.

Under REA, the spouse must knowingly consent in writing, and the signature must be witnessed by a pension plan representative or a notary public. ERISA § 205(c)(2), 29 U.S.C. §1055(c)(2); IRC § 417(c)(2), 26 U.S.C. § 417(c)(2). REA describes what information must accompany the consent to the waiver of a joint and survivor annuity. The requirement seeks to ensure that spouses will receive information about the effect of choosing a life annuity -- the option to receive higher pension benefits during the retiree's lifetime with no chance of receiving survivor benefits. If the spouse fails to consent (except in limited situations, *see* IRC § 417(c)(2)(B)), the participant loses the right to select the single life option. *See generally* D. McGill and D. Grubbs, Jr., FUNDAMENTALS OF PRIVATE PENSIONS, *Retirement Benefits* at 138-43 (6th ed. 1989).

A spouse's consent to any election of benefits is effective only for that spouse so that spousal consent must be obtained after each remarriage. S. REP. NO. 98-575 at 14, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2560. For example, if a participant has designated a child of the first marriage as a beneficiary with the first spouse's consent, a second marriage overrides that designation and requires the second spouse's consent for the child's interest to continue. *Id.*

Under ERISA, death extinguishes the spouse's rights. Thus, if the spouse dies before the participant, the spouse has no rights to, or in, the participant's pension benefits. They cannot be bequeathed.

C. Congress Achieved Its Purpose In Enacting The Retirement Equity Act Because More Surviving Spouses Are Receiving Survivor's Benefits.

After the passage of REA, Congress commissioned a number of studies from the Government Accounting Office to determine the effect of federal pension legislation on women and whether Congress was successful in achieving its purpose. Pub. L. No. 98-397, § 304, 98 Stat. 1454 (1984);

IRS EFFORTS UNDERWAY TO IMPROVE SPOUSAL CONSENT FORMS (GAO/HRD-92-31, Dec. 1991); PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW (GAO/HRD-92-49, Feb. 1992); PRIVATE PENSIONS: 1986 LAW WILL IMPROVE BENEFIT EQUITY IN MANY SMALL EMPLOYERS' PLANS (GAO/HRD-91-58, MAR. 1991); PRIVATE PENSIONS: IMPACT ON NEW VESTING RULES SIMILAR FOR WOMEN AND MEN (GAO/HRD-90-101, AUG. 1990); PRIVATE PENSIONS: SPOUSAL CONSENT FORMS HARD TO READ AND LACK IMPORTANT INFORMATION (GAO/HRD-90-20, Dec. 1989).

The study on survivor benefit coverage indicates that REA has been effective in increasing the number of surviving spouses who receive survivor's benefits. After the passage of REA, survivor benefit coverage for wives of private pension retirees increased by 15%. Thus, for many widows, survivor benefits from their husbands' pension plan constitute a significant part of the retirement income received from employment-based sources. PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW at 1-2, 6 (GAO/HRD-92-49, Feb. 1992).

A more recent study confirmed that the percentage of recipients selecting a joint and survivor option has steadily increased every year since the enactment of REA. In 1993-94, a joint and survivor option was selected by 62% of men and 28% of women who were eligible to receive pension benefits, resulting in 59% of married pensioners receiving a benefit with a joint and survivor option. The percentage selecting a joint and survivor option increased for more recent recipients: only 38% of recipients receiving benefits prior to 1975 chose the joint and survivor annuity compared with 62% of those retiring in 1993 or 1994. U.S. Department of Labor, Pension and Welfare Benefits Administration, RETIREMENT BENEFITS OF AMERICAN WORKERS: NEW FINDINGS FROM THE SEPTEMBER 1994 CURRENT POPULATION SURVEY at 5, 24, Table D.10 at 101-02 (1995).

In recent legislation, Congress reiterated that rules relating to spousal consent "serve important purposes in

protecting spousal rights to retirement plan benefits", but also recognized that the rules are extremely complicated.[10/] H.R. CONF. REP. NO. 3445, 104th Cong. 2d Sess. (1996). In order to assist spouses to understand and comply with these rules, Congress is requiring the Internal Revenue Service to develop sample language for spousal consent forms as well as publicity for the sample language in pension outreach efforts. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1457, 110 Stat. 1755, 1818-19 (August 20, 1996). By making the spousal consent forms easier to understand, Congress hopes that fewer spouses will waive their survivor's benefits without understanding what they have relinquished. Through this legislation, Congress reaffirmed its intent to further improve spousal pension protections.

III. LOUISIANA'S COMMUNITY PROPERTY LAW MUST BE PREEMPTED BY ERISA BECAUSE IT CONFLICTS WITH CONGRESS' INTENT TO PROMOTE UNIFORM ADMINISTRATION OF EMPLOYEE BENEFIT PLANS AND TO IMPROVE SPOUSAL PENSION PROTECTIONS.

In ERISA, Congress established an extremely detailed procedure in order for participants and beneficiaries to receive pension benefits. Not only must a participant work a certain number of years to be vested, but even after the participant is vested, Congress decreed certain requirements in order for the participant and beneficiaries to receive benefits. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 90-91. Indeed, Congress deemed survivor's pension benefits so important that married participants can only receive a benefit that does not provide for their spouses unless their spouses

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10/ A study on spousal consent forms concluded that participants and beneficiaries found the forms difficult to understand, even though the forms were the main source of information concerning spousal benefits. PRIVATE PENSIONS: SPOUSAL CONSENT FORMS HARD TO READ AND LACK IMPORTANT INFORMATION (GAO/HRD-90-20, Dec. 1989).

provide a written consent to waive their rights, ERISA § 205, 29 U.S.C. § 1055; IRC §§ 401(a)(11) & 417, 26 U.S.C. §§ 401(a)(11) & 417, and pension plans will lose their tax qualification if they do not include these provisions. IRC §§ 401(a)(11) & 501(a). Finally, although studies indicated that REA has been successful in increasing the number of spouses receiving survivor's benefits, PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW at 1-2, 6 (GAO/HRD-92-49, Feb. 1992), in 1996, Congress enacted legislation to better protect spousal benefits, showing its intent to continue to be involved in this field. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1457, 110 Stat. 1755, 1818-19 (August 20, 1996).

In direct conflict with ERISA's substantive provisions, Louisiana's state community property law also regulates who is entitled to pension benefits, and how and in what form those benefits are to be paid. ERISA, therefore, must preempt Louisiana's community property law. *E.g., District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 739; *Hewlett-Packard Co Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

Moreover, if ERISA does not preempt Louisiana's community property law, then that state law will undercut two of Congress' purposes when it enacted ERISA and REA: uniform administration of employee benefit plans, *Travelers*, 115 S. Ct. at 1677-78, and improvement of spousal pension protections. S. REP. NO. 98-575 at 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2558.

If the state law is not preempted, state community property laws would determine the beneficiaries of a participant's pension, instead of ERISA's uniform provisions. Pension plans would be required to comply with conflicting directives among 50 states, thereby increasing the administrative and financial burdens pension plans face. Compliance with different laws in 50 states would also make

administration of nationwide benefit plans more difficult and inefficient, which might lead sponsoring employers with benefit plans to reduce benefits or those employers without benefit plans to refrain from offering them. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10-12 (1987). Moreover, there would be no finality concerning payment of pension benefits. Instead, pension plans would become embroiled in state probate actions, also increasing their administrative costs. As a way to minimize their liability, pension plans might file interpleader actions to request court determinations concerning to whom payment shall be made. *E.g., Stickney v. Muhlenberg College TIAA-CREF Retirement Plan*, 896 F. Supp. 412 (E.D. Pa. 1995). A conclusion by this Court that ERISA does not preempt state community property laws would run counter to Congress' intent "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers*, 115 S. Ct. at 1677-78.

Finally, ERISA's spousal benefit rules, and ERISA's requirement that plans adopt these rules, are critical to determining whether a surviving spouse has a right to a benefit under a pension plan. *Cf. Ingersoll-Rand v. McClendon*, 498 U.S. at 139-40 ("[T]he existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself."). If state community property laws, such as Louisiana's, are not preempted by ERISA, they will completely negate Congress' intent of improving surviving spouse's pension protections.

Accordingly, ERISA must preempt Louisiana's community property law in order to prevent a direct conflict with ERISA's substantive provisions and accomplish Congress' intent to promote uniform administration of employee benefit plans and improve surviving spouse's pension protections.

CONCLUSION

For the foregoing reasons, AARP urges the Court to reverse the decision of the Fifth Circuit Court of Appeals.

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